Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 75

FILED

MAR 13 2006

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
Plaintiffs,	§	**Cause No. A 05 CA 334 SS**
v.	§	
FULBRIGHT & JAWORSKI, LLP	§	
Defendant.	§	

PLAINTIFFS' MOTION TO COMPEL TESTIMONY, RESPONSES TO INTERROGATORIES, AND RESPONSES TO REQUESTS FOR PRODUCTION REGARDING FULBRIGHT'S NET WORTH

TO THE HONORABLE COURT:

COMES NOW Plaintiffs Immunocept, LLC, Patrice Anne Lee, and James Reese Matson (collectively "Plaintiffs") and file this Motion To Compel Testimony, Responses To Interrogatories, and Responses To Requests For Production Regarding Fulbright's Net Worth against Fulbright & Jaworski, LLP ("Defendant"), and would respectfully show the Court as follows:

I.
FACTUAL BACKGROUND

This legal malpractice case involves a dispute arising from a patent prosecution performed by Defendant Fulbright & Jaworski. Plaintiffs' Complaint contains a claim for exemplary damages. *See* Plaintiffs' First Amended Complaint at p. 7. During discovery, Plaintiffs sought discovery regarding Fulbright's net worth. First, in Plaintiffs' Second Amended Notice of Intention to Take Oral Deposition and Subpoena Duces Tecum of the Corporate

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Representative of Fulbright & Jaworski, LLP, Plaintiffs asked Fulbright to designate a representative to testify regarding "all facts and the identity of all witnesses that have facts related to Fulbright's net worth." *See* Plaintiffs' Second Amended Notice of Intention to Take Oral Deposition and Subpoena Duces Tecum of the Corporate Representative of Fulbright & Jaworski, LLP, attached hereto as Exhibit A. Further, Plaintiffs seek discovery regarding Fulbright's net worth in Plaintiffs' Fourth Set of Interrogatories, and in Plaintiffs' Fifth Request For Production of Documents. *See* Plaintiffs' Fourth Set of Interrogatories Nos. 1 and 2, attached hereto as Exhibit B, and Plaintiffs' Fifth Request For Production, Requests Nos. 3-11, attached hereto as Exhibit C.

Fulbright has refused to provide discovery regarding its net worth. Fulbright filed Defendant's Motion For Protective Order Pursuant to Federal Rule of Civil Procedure 26(c), requesting that discovery regarding Fulbright's net worth be withheld until "such time as the Plaintiffs can plead and make a *prima facie* case regarding conduct making possible recovery of punitive damages." *See* Defendant's Motion For Protective Order Pursuant to Federal Rule of Civil Procedure 26(c) at p. 2, attached hereto as Exhibit D. In its motion for protective order, Fulbright further stated, "Fulbright is agreeable to producing information relating to its net worth at an appropriate time." *Id.* Plaintiffs did not file a response to Fulbright's motion for protective order, and the Court granted Fulbright's motion, ordering that Plaintiffs have no discovery regarding Fulbright's net worth pending further application to and order of the Court. *See* Order dated November 7, 2005, attached hereto as Exhibit E. Fulbright referenced this Order in its Objections to Plaintiffs' Fourth Set of Interrogatories and Responses and Objections to Plaintiffs' Fifth Request for Production of Documents, and refused to provide information regarding Fulbright's net worth. *See* Defendant Fulbright & Jaworski, LLP's Objections to Plaintiffs'

Fourth Set of Interrogatories Nos. 1-2, attached hereto as Exhibit F, and Defendant Fulbright & Jaworski, LLP's Responses and Objections to Plaintiffs' Fifth Request for Production of Documents Nos. 3-11, attached hereto as Exhibit G. As shown in this motion, under Texas law a *prima facie* showing of entitlement to punitive damages is not required for discovery of information about a defendant's net worth. Therefore, Plaintiffs seek an order of the Court ordering discovery evidencing Fulbright's net worth.

II.
ARGUMENT

A. Texas Law Does Not Require A *Prima Facie* Showing Of Entitlement To Punitive or Exemplary Damages Before Information About A Defendant's Net Worth May Be Sought

As described *supra*, in Defendant's motion for protective order, Fulbright requested that discovery regarding Fulbright's net worth be withheld until "such time as the Plaintiffs can plead and make a *prima facie* case regarding conduct making possible recovery of punitive damages." *See* Exhibit D, Defendant's Motion For Protective Order Pursuant to Federal Rule of Civil Procedure 26(c) at p. 2. However, Texas law expressly provides that a *prima facie* showing of entitlement to punitive damages ***is not required*** for discovery of information about a defendant's net worth. *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988).

In cases in which punitive or exemplary damages may be awarded, parties may discover and offer evidence of a defendant's net worth. *Id.* In *Lunsford*, the Texas Supreme Court explained that although some states allowing discovery of net worth require various evidentiary thresholds before information about a defendant's net worth may be sought, ***"[the Texas] rules of civil procedure and evidence do not require similar practices before net worth may be discovered.***" *Id.* (emphasis added). The Court continued, "Absent a privilege or specifically enumerated exemption, our rules permit discovery of any 'relevant' matter; thus, there is no evidentiary threshold a litigant must cross before seeking discovery." *Id. citing* Tex.R.Civ.P. 166b(2)(a). "Neither do the rules of evidence contemplate exclusion of otherwise relevant proof unless the evidence proffered is unfairly prejudicial, privileged, incompetent, or otherwise *legally* inadmissible." *Id. citing* Tex.R.Evid. 401, 403, 501-510, 601.

Although the *Lunsford* Court noted that a trial judge still has authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights, the Court concluded, "In a suit in which exemplary damages may be recovered, we hold defendant's net worth is 'relevant' and therefore discoverable under Tex.R.Civ.P. 166b(2)(a)." *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988). Plaintiffs have pleaded exemplary damages in their suit against Fulbright. *See* Plaintiffs' First Amended Complaint at p. 7. As a result, Fulbright's net worth information is discoverable pursuant to Texas law. *See also Chamberlain v. Cherry*, 818 S.W.2d 201, 206 (Tex.App.—Amarillo 1991, no writ) ("All that is required to allow discovery of net worth is an allegation of entitlement to punitive damages."); *Western Star Trucks US, Inc.*, 112 S.W.3d 756, 763 (Tex.App.—Eastland 2003, no writ) ("The Texas Supreme Court expressly held in *Lunsford* that a party seeking discovery of net worth information is not required to make a *prima facie* showing of entitlement to exemplary damages before discovery is permitted.") Therefore, Fulbright should be compelled to provide corporate representative testimony and responses to Plaintiffs' discovery requests relating to Fulbright's net worth.

B. Contrary to Fulbright's Assertion, the Facts Here Are More Than Sufficient To Support a Finding of Gross Negligence

In its Motion for Protective Order, Fulbright contends Plaintiffs have failed to even allege facts to support a finding of gross negligence. This assertion, however, is without basis. Plaintiffs will put on evidence that will show that (1) Fulbright assigned exclusive authority over the Plaintiffs' patent prosecution to a young and inexperienced attorney fresh out of law school; (2) provided her with no further training nor supervision of her work; and (3) never advised the client of the significance of the changes she made. Fulbright should have known that this conduct exposed Plaintiffs to an extreme degree of risk. Indeed, under such circumstances, it was not a matter of if a mistake would be made, but rather when. Such a conscious indifference to Plaintiffs' rights more than satisfies the standard for proving gross negligence under Texas law. *See Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). Accordingly, Fulbright should be compelled to provide corporate representative testimony and responses to Plaintiffs' discovery requests relating to Fulbright's net worth.

III.
CONCLUSION AND PRAYER

Texas law provides for the discovery of the Defendant's net worth information in cases in which exemplary damages are sought. Plaintiffs respectfully request that the Court compel Fulbright to provide corporate representative testimony, responses to Plaintiffs' interrogatories, and responses to Plaintiffs' requests for production relating to Fulbright's net worth. Plaintiffs further pray for such additional relief to which it may be entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

Counsel for movant and counsel for respondent have personally conducted a conference at which there was a substantive discussion of every item presented to the Court in this motion, and despite best efforts the counsel have not been able to resolve those matters presented.

Certified to the 10th day of March, 2006 by:

Jeremy A. Fielding

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served to the following counsel via *facsimile* on the 10th day of March, 2006:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Notice of Document/Attachment(s) Not Imaged but Stored with Document in Case File

See Original File to View/Copy Document/Attachment(s)

Civil Case No. A:05-CA-224 SS

Immunocept, LLC et al.

VS.

Fulbright & Jaworski LLP

Attachments to Document #: 75

Description: Plaintiffs' Motion to Compel Testimony, Responses to Interrogatories, and Responses to Requests for Production Regarding Fulbright's Net Worth

File Date: March 13, 2006

Prepared by: dm

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